



Agricultural Marketing Service

7 CFR Part 981

[Doc. No. AMS-SC-21-0076; SC21-981-1 PR]

Marketing Order Regulations for Almonds Grown in California

AGENCY: Agricultural Marketing Service, Department of Agriculture (USDA).

ACTION: Proposed rule.

SUMMARY: This proposed rule would implement a recommendation from the Almond Board of California (Board) to make changes to multiple provisions in the administrative requirements prescribed under the Federal marketing order regulating the handling of almonds grown in California. This action would revise several provisions in the Order's requirements to facilitate the efficient administration of the Order.

DATES: Comments must be received by [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Comments on the forms and information collection must also be received by [INSERT 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Interested persons are invited to submit written comments concerning this proposed rule. Comments must be sent to the Docket Clerk, Market Development Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW., STOP 0237, Washington, DC 20250-0237; Fax: (202) 720-8938; or via internet at: <https://www.regulations.gov>. Comments should reference the document number and the date and page number of this issue of the **Federal Register**. All comments will be made available for public inspection in the Office of the Docket Clerk during regular business hours, or can be viewed at: <https://www.regulations.gov>. All comments submitted in response to this proposed rule will be included in the record and will be made available to

the public on the internet at the address provided above. Please be advised that the identity of individuals or entities submitting comments will be made public.

FOR FURTHER INFORMATION CONTACT: Peter Sommers, Marketing Specialist, or Gary Olson, Regional Director, West Region Field Office, Market Development Division, Specialty Crops Program, AMS, USDA; Telephone: (559) 487-5901, Fax: (559) 487-5906, or E-mail: PeterR.Sommers@usda.gov or GaryD.Olson@usda.gov.

Small businesses may request information on complying with this regulation by contacting Richard Lower, Market Development Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW., STOP 0237, Washington, DC 20250-0237; Telephone: (202) 720-2491, Fax: (202) 720-8938, or E-mail: Richard.Lower@usda.gov.

SUPPLEMENTARY INFORMATION: This action, pursuant to 5 U.S.C. 553, proposes to amend regulations issued to carry out a marketing order as defined in 7 CFR 900.2(j). This proposed rule is issued under Marketing Order No. 981, as amended (7 CFR part 981), regulating the handling of almonds grown in California. Part 981 (referred to as the "Order") is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the "Act." The Board locally administers the Order and comprises growers and handlers of almonds operating within the production area.

The Department of Agriculture (USDA) is issuing this proposed rule in conformance with Executive Orders 12866 and 13563. Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting

flexibility. This action falls within a category of regulatory actions that the Office of Management and Budget (OMB) exempted from Executive Order 12866 review.

This proposed rule has been reviewed under Executive Order 13175 – Consultation and Coordination with Indian Tribal Governments, which requires agencies to consider whether their rulemaking actions would have tribal implications. The Agricultural Marketing Service (AMS) has determined this proposed rule is unlikely to have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. This proposed rule is not intended to have retroactive effect.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

This proposed rule would amend administrative requirements in the Order regulating the roadside stand exemption, credit for market promotion activities, quality control, exempt dispositions, and interest and late charges provisions. In addition, the proposed rule would stay two sections of the administrative requirements that define almond butter and stipulate disposition in reserve outlets by handlers. These proposed

changes modify the requirements to reflect updates in industry practices and are expected to help facilitate the orderly administration of the Order. The Board unanimously recommended these changes at meetings held on December 7, 2020, and June 17, 2021.

Multiple sections in the Order provide the authority for this proposed action. The authorities are cited with the descriptions of each of the proposed changes in the following narrative.

Section 981.13 of the Order defines the term “handler.” The definition includes an exemption for roadside stand sales. Section 981.413 of the Order’s administrative requirements further expounds roadside stand sales by setting certain conditions that must be met for sales to be exempted from regulation under the Order. This proposed rule would add language to the requirements to clarify that sales of almonds through E-commerce (electronic commerce) are not exempt from regulation under the roadside stand exemption.

Section 981.41(c) of the Order provides the authority to establish provisions for crediting a handler’s direct expenditures for marketing promotion against that handler’s assessment obligation. Section 981.441 of the Order’s administrative requirements delineates the provisions that handlers must meet to have a portion of their marketing promotion expenditures, including paid advertising, credited against their pro rata assessment obligation. This provision is otherwise known as Credit-Back. This proposed rule would allow the Board, with the approval of the Secretary, to annually establish a limit on the Credit-Back amount allowed for a handler’s expenditures on E-commerce. Further, this rule would modify the receipt submission and reimbursement requirements for the Credit-Back program and update the provisions for appealing the Board’s Credit-Back decisions.

Section 981.42 of the Order provides the authority to establish quality control regulations for both incoming and outgoing product. Section 981.442 of the Order’s

administrative requirements establishes quality control regulations under that authority. Section 981.442(a) establishes the quality requirements for incoming product received by handlers. Section 981.442(b) establishes the quality requirements for outgoing product prior to being shipped by handlers.

This proposal would modify provisions in § 981.442(a) to clarify ambiguous language, remove irrelevant dates, and more clearly define “accepted user” as it is referenced in the regulations. The proposed rule would also relax the requirements for handlers in meeting their disposition obligation under the regulations. The incoming quality requirements would be amended to allow inedible kernels, foreign material, and other defects sorted from off-site cleaning facilities to be credited to a handler’s disposition obligation. In addition, almond meal would be allowed to meet the non-inedible portion of the disposition obligation, with the meal content to be determined in a manner acceptable to the Board.

In § 981.442(b), the proposed rule would amend the regulations to facilitate handlers utilizing off-site cleaning and treatment facilities in fulfillment of their quality control requirements. The proposal would allow the transfer of product for off-site cleaning without being considered a shipment, would designate off-site treatment facilities as “custom processors,” and would establish application and approval procedures for Board authorization of such custom processors. This action would also clarify the roles of the Technical Expert Review Panel (TERP) and the Board in administering the program as detailed in several provisions in § 981.442(b). Lastly, the proposed rule would refine the duties of a Direct Verifiable (DV) program auditor to disallow individuals who conduct process validations from being named as the DV auditor for that same equipment used in the treatment process.

Section 981.50 of the Order establishes handler reserve obligation requirements. Under those Order provisions, certain products are exempted from the reserve obligation,

subject to the accountability of the Board. Section 981.450 establishes the provisions for exempt dispositions under the reserve obligation. This proposed rule would enhance the procedures currently in place for the Board to account for exempt dispositions. Under the proposed rule, outlets for exempted product would need to be pre-approved by the Board in accordance with the requirements contained in § 981.442(a)(7).

Section 981.66(b) of the Order establishes the conditions governing the disposition of reserve product. Within that paragraph, diversion of reserve almonds to be manufactured into almond butter is listed as an allowable outlet for such product. Section 981.466 further defines “almond butter” as used in § 981.66. The expanded definition of almond butter is no longer relevant in the administration of the program. The proposed rule would stay § 981.466 indefinitely.

Section 981.467 establishes the requirements regarding the disposition in reserve outlets by handlers. The section details the establishment of agents of the Board, delineates reserve credit in satisfaction of a reserve obligation, sets minimum prices, and establishes certain dates pertaining to the reserve disposition obligations. As the Order is not currently regulating volume, and a significant portion of the requirements is outdated, the provisions in § 981.467 are not currently relevant to the administration of the Order. As such, this proposed rule would stay the entire section indefinitely.

Lastly, § 981.481 stipulates the requirements for submission of handler assessment payments, which includes documentary requirements for proof of timely submission of assessment payments. Other than actual receipt of payment in the Board’s office within 30 days of the invoice date on the handler’s statement, the current provisions only identify the U.S. Postal Service postmark as proof of timely submission. This proposed rule would add “or by some other verifiable delivery tracking system” to allow handlers alternative delivery methods.

The Board believes that the changes recommended herein are necessary to update

the Order's administrative requirements to adapt to changes in the industry and to reflect current industry practices. Many of the revisions may be considered conforming changes, but the proposed rule also makes changes to the Credit-Back provisions and quality control regulations that the Board views as essential to the continued efficient administration of the Order. The proposed changes contained herein are expected to facilitate the orderly marketing of California almonds and benefit growers and handlers in the industry.

Initial Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601-612), the Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities. Accordingly, AMS has prepared this initial regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, are unique in that they are brought about through group action of essentially small entities acting on their own behalf.

There are approximately 7,600 almond growers in the production area and approximately 100 handlers subject to regulation under the Order. Small agricultural producers are defined by the Small Business Administration (SBA) as those having annual receipts of less than \$1,000,000, and small agricultural service firms are defined as those having annual receipts of less than \$30,000,000 (13 CFR 121.201).

The National Agricultural Statistics Service (NASS) reported in its 2017 Census of Agriculture (Census) that there were 7,611 almond farms in the production area, of which 6,683 had bearing acres. Additionally, the Census indicates that out of the 6,683

California farms with bearing acres of almonds, 4,425 (66 percent) have fewer than 100 bearing acres.

In another publication, NASS reported a 2019 crop year average yield of 2,160 pounds per acre and a season average grower price of \$2.43 per pound. Therefore, a 100-acre farm with an average yield of 2,160 pounds per acre would produce about 216,000 pounds of almonds (2,160 pounds times 100 acres equals 216,000 pounds). At \$2.43 per pound, that farm's production would be valued at \$524,880 (216,000 pounds times \$2.43 per pound equals \$524,880). Since the Census indicated that 66 percent of California's almond farms are less than 100 acres, it could be concluded that the majority of California almond growers had annual receipts from the sale of almonds of less than \$524,880 for the 2019-20 crop year, which is below the SBA threshold of \$1,000,000 for small producers. Therefore, the majority of growers may be classified as small businesses.

To estimate the proportion of almond handlers that would be considered small businesses, it was assumed that the unit value per pound of almonds exported in a particular year could serve as a representative almond price at the handler level. A unit value for a commodity is the value of exports divided by the quantity exported. Data from the Global Agricultural Trade System (GATS) database of USDA's Foreign Agricultural Service showed that the value of almond exports from August 2019 to July 2020 (combining shelled and inshell) was \$4.691 billion. The quantity of almond exports over that time-period was 1.78 billion pounds. Dividing the export value by the quantity yields a unit value of \$2.64 per pound (\$4.691 billion divided by 1.78 billion pounds equals \$2.64).

NASS estimated that the California almond industry produced 2.55 billion pounds of almonds in 2019. Applying the \$2.64 derived representative handler price per pound to total industry production results in an estimated total revenue at the handler level of

\$6.73 billion (2.55 billion pounds X \$2.64 per pound). With an estimated 100 handlers in the California almond industry, average revenue per handler would be approximately \$67.3 million (\$6.73 billion divided by 100). Assuming a normal distribution of revenues, most almond handlers shipped almonds valued at more than \$30,000,000 during the 2019-20 crop year. Therefore, the majority of handlers may be classified as large businesses.

This proposed rule would revise multiple provisions in the Order's administrative requirements. This proposal would amend regulations covering the Order's roadside stand exemption, credit for market promotion activities, quality control, exempt dispositions, and interest and late charges provisions. In addition, it would stay regulations contained in §§ 981.466 and 981.467. One of the sections defines almond butter and the other regulates almond disposition in reserve outlets by handlers. Both sections would be stayed indefinitely.

More specifically, the proposed rule would add language in § 981.413 to clarify that sales of almonds through E-commerce are not exempt from regulation under the roadside stand exemption.

In addition, the action would modify § 981.441 to allow the Board, with the approval of the Secretary, to annually establish a limit on the Credit-Back amount allowed for a handler's expenditures on E-commerce. Further, this rule would modify the receipt submission and reimbursement requirements for the Credit-Back program, as well as update the provisions for appealing the Board's Credit-Back decisions.

In § 981.442(a), the proposed rule would clarify ambiguous language, remove irrelevant dates, and more clearly define the term "accepted user" as it is referenced in the regulations. It would also relax the requirements for handlers in meeting their disposition obligation under the Order.

In § 981.442(b), the proposed rule would allow the transfer of product for off-site cleaning without being considered a shipment, designate off-site treatment facilities as “custom processors,” and establish the application and approval procedures for Board authorization of custom processors. This proposal would also clarify the roles of the TERP and the Board in administering the program in several subparagraphs in the section. Further, the proposed rule would refine the definition of a DV program auditor to disallow individuals who conduct process validations from being named as the DV auditor for that same equipment used in the treatment process.

Additionally, this proposed rule would amend § 981.450 to require outlets for exempted product be Board-approved, in accordance with § 981.442(a)(7).

Further, under the proposed action, § 981.466, which defines “almond butter” as it is used in § 981.66(b), is no longer relevant in the administration of the program and would be stayed indefinitely. In addition, as the Order is not currently regulating volume, § 981.467 is not necessary for the administration of the Order and would also be stayed indefinitely.

Lastly, this action would revise § 981.481 by adding “or by some other verifiable delivery tracking system” to the requirements to allow handlers alternative trackable delivery methods for demonstration of timely submission of assessment payments.

The authorities for the proposed changes above are contained in §§ 981.13, 981.41, 981.42, 981.50, 981.66, 981.67, and 981.81 of the Order.

The Board believes that the administrative requirement revisions recommended herein are necessary to reflect changes in the industry and to update the regulations to reflect current practices. Many of the modifications may be considered conforming changes, but this proposal also makes substantive changes to the Credit-Back provisions and quality control requirements that the Board views as essential to the efficient administration of the Order. The proposed changes contained herein are expected to

facilitate the orderly marketing of California almonds and benefit growers and handlers in the industry. The Board unanimously recommended these changes at meetings held on December 7, 2020, and June 17, 2021.

AMS anticipates that this proposed rule would impose minimal, if any, additional costs on handlers or growers, regardless of size. The proposed changes to the administrative requirements are intended to clarify certain provisions, remove ambiguous and obsolete language, and adapt the requirements to facilitate the orderly marketing of almonds. The benefits derived from this proposed rule are not expected to be disproportionately more or less for small handlers or growers than for larger entities.

The Board considered alternatives to this action, including making no changes to the current requirements, only making changes to some of the requirements, and recommending the changes be considered as two separate rulemaking actions. Prior to the recommendation of the Board, the Board's Almond Quality, Food Safety and Services Committee reviewed the program, surveyed handlers, and unanimously recommended this action to the Board. After consideration of all the alternatives, and in consultation with USDA, the Board determined that making all the recommended changes, collectively in one rule, would be the best option to facilitate the Order's administration, contribute to the orderly marketing of almonds, and provide the greatest benefit to growers and handlers while maintaining the integrity of the Order.

Further, the Board's meetings were widely publicized throughout the California almond industry, and all interested persons were invited to attend the meetings and participate in Board deliberations. Like all Board and subcommittee meetings, the December 7, 2020, and June 17, 2021, meetings were public meetings, and all entities, both large and small, were able to express their views on this issue. Finally, interested persons are invited to submit comments on this proposed rule, including the regulatory and information collection impacts of this proposed action on small businesses.

In accordance with the Paperwork Reduction Act of 1995, (44 U.S.C. Chapter 35), the Order's information collection requirements have been previously approved by the Office of Management and Budget (OMB) and assigned OMB Nos. 0581-0178 (Vegetable and Specialty Crops) and 0581-0242 (Almond Salmonella). This proposed rule announces AMS's intent to request approval from OMB for amendments made to existing information collections under OMB Nos. 0581-0178 and 0581-0242, and for a new information collection under OMB No. 0581-NEW.

Upon finalization of the proposed rule, AMS will submit a Justification for Change to OMB for the Statement of Intent form contained in the ABC Credit-Back Guide (OMB No. 0581-0178). The form is necessary to administer the Credit-Back provisions as established in § 981.441 of the Order's requirements. This proposed rule would change the number of days that the applicant is afforded to submit all necessary paperwork for proper evaluation of their Credit-Back claim from 76 days to 60 days. The Credit-Back Statement of Intent form included in the Credit-Back Guide would be changed accordingly.

In addition, also upon finalization of the proposed rule, AMS will submit a Justification for Change to OMB for the ABC Form 52 - Direct Verifiable (DV) Program for Further Processing of Untreated Almonds Application Form (OMB No. 0581-0242). The form is necessary to administer the DV Program established by § 981.442(b)(6)(i) in the Order's quality control requirements. The proposed rule would change the body that approves DV Program applications from the TERP to the Board. The instructions that accompany ABC Form 52 would need to be revised accordingly.

Lastly, this proposed rule would create a new form for California almond handlers, titled ABC Form 55 - Custom Processor Application.

Title: Custom Processor Application (7 CFR Part 981)

OMB Number: 0581-NEW.

Type of Request: New Collection.

Abstract: The information requirements in this request are essential to carry out the intent of the Act and to administer the Order. The Order is effective under the Act, and USDA is responsible for the oversight of the Order's administration.

The Order's quality control requirements for outgoing product require handlers to subject their almonds to a treatment process or processes prior to shipment to reduce potential *Salmonella* bacteria contamination. The Order's quality control requirements allow handlers to utilize off-site treatment facilities to fulfill that requirement. The Committee unanimously recommended that the Order's quality control requirements be amended to define off-site treatment facilities located within the production area as "custom processors" and to require such custom processors to annually apply to the Board for approval.

An individual desiring approval as a custom processor must demonstrate that their facility meets the Order's treatment process requirements and must submit an application to the Board. This form, numbered ABC Form 55 and titled "Custom Processor Application," would be submitted directly to the Board once each year no later than July 31. The application would provide the Board with the name of the applicant, the location of each treatment facility covered by the application, applicant contact information, and certification that the applicant's technology and equipment provide a treatment process that has been validated by a Board-approved process authority.

The Order authorizes the Board to collect certain information necessary for the administration of the Order. The information collected would only be used by authorized representatives of the USDA, including the AMS Specialty Crops Program regional and headquarters staff, and authorized employees of the Board. All proprietary information would be kept confidential in accordance with the Act and the Order.

The proposed request for new information collection under the Order is as follows:

Custom Processor Application

Estimate of Burden: Public reporting burden for this collection of information is estimated to be an average of 0.5 hours per response.

Respondents: Nut processors located within the Order's area of production.

Estimated Number of Respondents: 25.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Responses: 25.

Estimated Total Annual Burden on Respondents: 12.5 hours.

Comments are invited on: (1) whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility; (2) the accuracy of the Agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments should reference OMB No. 0581-NEW and the marketing order for almonds grown in California. Comments should be sent to the USDA in care of the Docket Clerk at the previously mentioned address or at <https://www.regulations.gov>.

All responses to this notice will be summarized and included in the request for OMB approval. All comments received will become a matter of public record and will be available for public inspection during regular business hours at the address of the Docket Clerk or at <https://www.regulations.gov>.

If this proposed rule is finalized, this information collection will be merged with the forms currently approved under OMB No. 0581-0242 (Almond Salmonella).

As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies. USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this proposed rule.

AMS is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

Further, the Board's meetings are widely publicized throughout the California almond industry, and all interested persons are invited to attend the meetings and participate in Board deliberations on all issues. Like all Board meetings, the December 7, 2020, and June 17, 2021, meetings were open to the public, and all entities, both large and small, were able to express their views on this issue. Also, the Board has several appointed committees to review certain issues and make recommendations to the Board. The Board's Almond Quality, Food Safety, and Services Committee met several times in 2019 and discussed this issue in detail. Those meetings were also public meetings, and both large and small entities were able to participate and express their views. Finally, interested persons are invited to submit comments on this proposed rule, including the regulatory and information collection impacts of this action on small businesses.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: <https://www.ams.usda.gov/rules-regulations/moa/small-businesses>. Any questions about the compliance guide should be sent to Richard Lower at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

A 60-day comment period is provided to allow interested persons to respond to this proposal. All written comments timely received will be considered before a final determination is made on this matter.

List of Subjects in 7 CFR Part 981

Marketing agreements, Nuts, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Agricultural Marketing Service proposes to amend 7 CFR part 981 as follows:

PART 981 - ALMONDS GROWN IN CALIFORNIA

1. The authority citation for 7 CFR part 981 continues to read as follows:

Authority: 7 U.S.C. 601-674.

2. Amend § 981.413 by adding a sentence at the end of the paragraph to read as follows:

§ 981.413 Roadside stand exemption.

* * * Sales of almonds through E-commerce are not eligible for this exemption.

3. Amend §981.441 by revising paragraphs (e)(4)(ii)(K), (e)(5), (e)(6)(ii) through (iv), and (f) to read as follows:

§ 981.441 Credit for market promotion activities, including paid advertising.

* * * * *

(e) * * *

(4) * * *

(ii) * * *

(K) Development and use of website on the Internet for advertising and public relations purposes, including E-commerce (mail ordering through the Internet): *Provided*, That Credit-Back for such activities shall be limited to a specific amount per crop year, to be established in conjunction with the approval of the Board’s annual budget by the

Secretary. No credit shall be given for costs for E-commerce administration, Extranet (restricted websites within the Internet), Intranet (inter-office communication network), or portions of a website that target the farming or grower trade.

* * * * *

(5) If the handler is promoting pursuant to a contract with the Foreign Agricultural Service (FAS) of the U.S. Department of Agriculture (USDA) and/or the California Department of Food and Agriculture (CDFA), such activities must also meet the requirements of paragraphs (e)(1), (2), (3), (4), and (6) of this section. Unless the Board is administering the foreign marketing program, such activities shall not be eligible for Credit-Back unless the handler certifies that it was not and will not be reimbursed by either FAS or the CDFA for the amount claimed for Credit-Back, and has on record with the Board all claims for reimbursement made to FAS and/or the CDFA. Foreign market expenses paid by third parties as part of a handler's contract with FAS or CDFA will not be eligible for Credit-Back.

(6) * * *

(ii) Handlers may receive credit against their assessment obligation up to the year-to-date advertising amount of the assessment, less the year-to-date reimbursed claims: *Provided*, That handlers submit the required documentation for a qualified activity at least 2 weeks prior to the mailing of each of the Board's first and second assessment notices, and at least 3 weeks prior to the mailing of each of the Board's third and fourth assessment notices in a crop year. In all other instances, handlers must remit the advertising assessment to the Board when billed, and a refund will be issued to the extent of proven, qualified activities.

(iii) In addition to the credit against an assessment obligation as provided in paragraph (e)(6)(ii) of this section, the Board will issue Credit-Back reimbursements, by check or other means, on June 30 for any claim submission received by May 31 of the

same crop year.

(iv) The final opportunity to submit a claim for any given crop year requires submission of notice to the Board by August 15 of the following crop year. Notice must be given using the Statement of Intent form that is included in the Credit-Back Guide. Final claim submissions for activities outlined in the Statement of Intent must be submitted with all required elements no more than 60 days after the close of the crop year.

(f) If a determination is made by the Board staff that a particular promotional activity is not eligible for Credit-Back because it does not meet the criteria specified in this section, or for any other reason, the affected handler may request a Board-designated committee to review the Board staff's decision. If the affected handler disagrees with the decision, the handler may request that the Board review the designated committee's decision. If the handler disagrees with the decision of the Board, the handler, through the Board, may request that the Secretary review the Board's decision. Handlers have the right to request anonymity in the review of their appeal. The Secretary maintains the right to review any decisions made by the aforementioned bodies at his/her discretion.

4. Amend § 981.442 by:

- a. Revising paragraphs (a)(1), (a)(4)(i), and (a)(5);
- b. Revising the introductory text of paragraph (b);
- c. Revising paragraphs (b)(2), (b)(3)(i) and (v), and (b)(4)(i) and (v);
- d. Revising the introductory text of paragraph (b)(6)(i); and
- e. Revising paragraphs (b)(6)(i)(A), (C), and (D).

The revisions read as follows:

§ 981.442 Quality control.

(a) * * *

(1) *Sampling.* Each handler shall cause a representative sample of almonds to be

drawn from each lot of any variety received from any incoming source. The sample shall be drawn before inedible kernels are removed from the lot after hulling/shelling, or before the lot is processed or stored by the handler. For receipts at premises with mechanical sampling equipment and under contracts providing for payment by the handler to the grower for sound meat content, samples shall be drawn by the handler in a manner acceptable to the Board and the inspection agency. The inspection agency shall make periodic checks of the mechanical sampling procedures. For all other receipts, including but not limited to field examination and purchase receipts, accumulations purchased for cash at the handler's door or from an accumulator, or almonds of the handler's own production, sampling shall be conducted or monitored by the inspection agency in a manner acceptable to the Board. All samples shall be bagged and identified in a manner acceptable to the Board and the inspection agency.

* * * * *

(4) * * *

(i) The weight of inedible kernels in excess of 2 percent of kernel weight reported to the Board of any variety received by a handler shall constitute that handler's disposition obligation. For any almonds sold inshell, the weight may be reported to the Board and that disposition obligation for that variety reduced proportionately.

* * * * *

(5) *Meeting the disposition obligation.* Each handler shall meet its disposition obligation by delivering packer pickouts, kernels rejected in blanching, pieces of kernels, meal accumulated in manufacturing, or other material, to Board-approved accepted users, which can include, but is not limited to, crushers, feed manufacturers, feeders, or dealers in nut wastes, located withing the production area. Inedible kernels, foreign material, and other defects sorted from edible kernels by off-site cleaning facilities may be used towards that handler's disposition obligation or destroyed. Handlers shall notify the

Board at least 72 hours prior to delivery of product to an off-site cleaning facility or accepted user location: *Provided*, That the Board or its employees may lessen this notification time whenever it determines that the 72 hour requirement is impracticable. The Board may supervise deliveries at its option. In the case of a handler having an annual total obligation of less than 1,000 pounds, delivery may be to the Board in lieu of an accepted user, in which case the Board would certify the disposition lot and report the results to the USDA. For dispositions by handlers with mechanical sampling equipment, samples may be drawn by the handler in a manner acceptable to the Board and the inspection agency. For all other dispositions, samples shall be drawn by or under supervision of the inspection agency. Upon approval by the Board and the inspection agency, sampling may be accomplished at the accepted user's destination. The edible and inedible almond meat content of each delivery shall be determined by the inspection agency and reported by the inspection agency to the Board and the handler. The handler's disposition obligation will be credited upon satisfactory completion of ABC Form 8. ABC Form 8, Part A, is filled out by the handler, and Part B by the accepted user. At least 50 percent of a handler's total crop year inedible disposition obligation shall be satisfied with dispositions consisting of inedible kernels as defined in § 981.408: *Provided*, That this 50 percent requirement shall not apply to handlers with total annual obligations of less than 1,000 pounds. Each handler's disposition obligation shall be satisfied when the almond meat content of the material delivered to accepted users equals the disposition obligation, but no later than September 30 succeeding the crop year in which the obligation was incurred. Almond meal can be used for meeting the non-inedible portion of the obligation. Meal content shall be determined in a manner acceptable to the Board.

* * * * *

(b) *Outgoing*. Pursuant to § 981.42(b), and except as provided in § 981.13 and in

paragraph (b)(6) of this section, handlers shall subject their almonds to a treatment process or processes prior to shipment to reduce potential *Salmonella* bacteria contamination in accordance with the provisions of this section. Temporary transfer by a handler to an off-site cleaning facility is not considered a shipment under this section. Handlers may utilize off-site cleaning facilities within the production area, on record with the Board, to provide sorting services to separate inedible kernels, foreign material, and other defects from edible kernels. Product sent by a handler to an off-site cleaning facility is considered a temporary transfer, with ownership maintained by the handler, and accountability required for all product fractions and handler obligations pursuant to § 981.42.

* * * * *

(2) *On-site versus off-site treatment.* Handlers shall subject almonds to a treatment process or processes prior to shipment either at their handling facility (on-site) or a custom processor (defined as a Board-approved off-site treatment facility located within the production area subject to the provisions of paragraph (b)(4)(v) of this section). Transportation of almonds by a handler to a custom processor shall not be deemed a shipment. A handler with an on-site treatment process or processes may use such facility to act as a custom processor for other handlers.

(3) * * *

(i) Validation means that the treatment technology and equipment have been demonstrated to achieve in total a minimum 4-log reduction of *Salmonella* bacteria in almonds. Validation data prepared by a Board-approved process authority must be submitted to the Board, and accepted by the TERP, for each piece of equipment used to treat almonds prior to its use under the program.

* * * * *

(v) The TERP, in coordination with the Board, may revoke any approval for cause. The Board shall notify the process authority in writing of the reasons for revoking the approval. Should the process authority disagree with the decision, they may appeal the decision in writing to the Board, and ultimately to USDA. A process authority whose approval has been revoked must submit a new application to the TERP and await approval.

(4) * * *

(i) By May 31, each handler shall submit to the Board a Handler Treatment Plan (Treatment Plan) for the upcoming crop year. A Treatment Plan shall describe how a handler plans to treat his or her almonds and must address specific parameters as outlined by the Board for the handler to ship almonds. Such plan shall be reviewed by the Board, in conjunction with the inspection agency, to ensure it is complete and can be verified, and be approved by the Board. Almonds sent by a handler for treatment at a custom processing facility affiliated with another handler shall be subject to the approved Treatment Plan utilized at that facility. Handlers shall follow their own approved Treatment Plans for almonds sent to custom processors that are not affiliated with another handler.

* * * * *

(v) Custom processors shall provide access to the inspection agency and Board staff for verification of treatment and review of treatment records. Custom processors shall utilize technologies that have been determined to achieve, in total, a minimum 4-log reduction of Salmonella bacteria in almonds, pursuant to a letter of recommendation issued by FDA or accepted by TERP. Custom processors must submit a Custom Processor Application, ABC Form XX, to the Board annually by July 31. A custom processor who submits a timely application, and utilizes a treatment process or processes that has been validated by a Board-approved process authority and approved by the

Board in conjunction with the TERP, shall be approved by the Board for handler use.

The Board may revoke any such approval for cause. The Board shall notify the custom processor of the reasons for revoking the approval. Should the custom processor disagree with the Board's decision, it may appeal the decision in writing to USDA. Handlers may treat their almonds only at custom processor treatment facilities that have been approved by the Board.

* * * * *

(6) * * *

(i) Handlers may ship untreated almonds for further processing directly to manufacturers located within the U.S., Canada, or Mexico. This program shall be termed the Direct Verifiable (DV) program. Handlers may only ship untreated almonds to manufacturers who have submitted ABC Form No. 52, "Application for Direct Verifiable (DV) Program for Further Processing of Untreated Almonds," and have been approved by the Board. Such almonds must be shipped directly to approved manufacturing locations, as specified on Form No. 52. Such manufacturers (DV Users) must submit an initial Form No. 52 to the Board for review and approval in conjunction with the TERP. Should the applicant disagree with the Board's decision concerning approval, it may appeal the decision in writing to the Board, and ultimately to USDA. For subsequent crop years, approved DV Users with no changes to their initial application must send the Board a letter, signed and dated, indicating that there are no changes to the application the Board has on file. Approved DV Users desiring to make changes to their approved application must resubmit Form No. 52 to the Board for approval. The TERP, in coordination with the Board, may revoke any approval for cause. The Board shall notify the DV User in writing of the reasons for revoking the approval. Should the DV User disagree with the decision, it may appeal the decision in writing to the Board, and ultimately to USDA. A DV User whose approval has been revoked must submit a new

application to the Board and await approval. The Board shall issue a DV User code to an approved DV User. Handlers must reference such code in all documentation accompanying the lot and identify each container of such almonds with the term “unpasteurized.” Such lettering shall be on one outside principal display panel, at least ½ inch in height, clear and legible. If a third party is involved in the transaction, the handler must provide sufficient documentation to the Board to track the shipment from the handler's facility to the approved DV user. While a third party may be involved in such transactions, shipments to a third party and then to a manufacturing location are not permitted under the DV program. Approved DV Users shall:

(A) Subject such almonds to a treatment process or processes using technologies that achieve in total a minimum 4-log reduction of *Salmonella* bacteria as determined by the FDA or established by a process authority accepted by the TERP, in accordance with and subject to the provisions and procedures of paragraph (b)(3) of this section. Establish means that the treatment process and protocol have been evaluated to ensure the technology's ability to deliver a lethal treatment for *Salmonella* bacteria in almonds to achieve a minimum 4-log reduction;

* * * * *

(C) Have their treatment technology and equipment validated by a Board-approved process authority, and accepted by the TERP. Documentation must be provided with their DV application to verify that their treatment technology and equipment have been validated by a Board-approved process authority. Such documentation shall be sufficient to demonstrate that the treatment processes and equipment achieve a 4-log reduction in *Salmonella* bacteria. Treatment technology and equipment that have been modified to a point where operating parameters such as time, temperature, or volume change, shall be revalidated;

(D) Have their technology and procedures verified by a Board-approved DV auditor to ensure they are being applied appropriately. A DV auditor may not be an employee of the manufacturer that they are auditing. A DV auditor may not be the same individual who conducted the process validation accepted by the TERP for the equipment being audited. DV auditors must submit a report to the Board after conducting each audit. DV auditors must submit an initial application to the Board on ABC Form No. 53, “Application for Direct Verifiable (DV) Program Auditors,” and be approved by the Board in coordination with the TERP. Should the applicant disagree with the decision concerning approval, they may appeal the decision in writing to the Board, and ultimately to USDA. For subsequent crop years, approved DV auditors with no changes to their initial application must send the Board a letter, signed and dated, indicating that there are no changes to the application the Board has on file. Approved DV auditors whose status has changed must submit a new application. The Board, in coordination with the TERP, may revoke any approval for cause. The Board shall notify the DV auditor in writing of the reasons for revoking the approval. Should the DV auditor disagree with the decision to revoke, it may appeal the decision in writing to the Board, and ultimately to USDA. A DV auditor whose approval has been revoked must submit a new application to the Board and await approval;

* * * * *

5. Revise §981.450 to read as follows:

§ 981.450 Exempt dispositions.

As provided in §981.50, any handler disposing of almonds for crushing into oil, or for animal feed, may have the kernel weight of these almonds excluded from their program obligations, so long as:

(a) The handler qualifies as, or delivers such almonds to, a Board-approved accepted user;

(b) Each delivery is made directly to the accepted user by June 30 of each crop year; and

(c) Each delivery is certified to the Board by the handler on ABC Form 8.

§§ 981.466 and 981.467 [Stayed]

6. Sections 981.466 and 981.467 are stayed indefinitely.

7. Revise § 981.481 to read as follows:

§ 981.481 Interest and late payment charges.

(a) Pursuant to §981.81(e), the Board shall impose an interest charge on any handler whose assessment payment has not been received in the Board's office within 30 days of the invoice date shown on the handler's statement, or the envelope containing the payment has not been legibly postmarked by the U.S. Postal Service or some other verifiable delivery tracking system, as having been remitted within 30 days of the invoice date. The interest charge shall be a rate of one- and one-half percent per month and shall be applied to the unpaid assessment balance for the number of days all or any part of the unpaid balance is delinquent beyond the 30-day payment period.

(b) In addition to the interest charge specified in paragraph (a) of this section, the Board shall impose a late payment charge on any handler whose payment has not been received in the Board's office, or the envelope containing the payment legibly postmarked by the U.S. Postal Service or some other verifiable delivery tracking system, within 60 days of the invoice date. The late payment charge shall be 10 percent of the unpaid balance.

Erin Morris,

Associate Administrator,

Agricultural Marketing Service.